

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

AUG -2 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CRESCENCIO SANDOVAL,)	
)	
Plaintiff/Counterdefendant/)	2 CA-CV 2011-0135
Appellee,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
COLLEEN D. EICHER and HARRY E.)	Rule 28, Rules of Civil
EICHER, wife and husband,)	Appellate Procedure
)	
Defendants/Counterplaintiffs/)	
Appellants.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20109347

Honorable Richard E. Gordon, Judge

VACATED AND REMANDED

Law Office of Patrick Coppen, P.C.
By Patrick C. Coppen

Tucson
Attorney for Defendants/Counterplaintiffs/
Appellants

V Á S Q U E Z, Presiding Judge.

¶1 In this special detainer action arising from a residential lease agreement, Colleen and Harry Eicher appeal from a judgment entered after a jury verdict in favor of Crescencio Sandoval. On appeal, the Eichers argue the jury verdict finding them not guilty of special detainer but awarding Sandoval damages violates A.R.S. § 33-1377(G), as well as principles of due process and equal protection under the state and federal constitutions. For the reasons stated below, we vacate the judgment and the jury’s damages award in favor of Sandoval and remand for further proceedings.

Factual Background and Procedural History

¶2 “We view the facts in the light most favorable to sustaining the trial court’s judgment.” *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). In November 2008, the Eichers and Sandoval entered into a residential lease agreement (the lease) involving a house on East Canyon View Drive (the property) in Tucson.¹ According to the terms of the lease, the Eichers agreed to pay Sandoval rent in the sum of \$1,600 per month for a term of thirty-six months, beginning December 1, 2008. The Eichers lived at the property with their adult daughter.

¶3 On November 16, 2010, Sandoval sent the Eichers a “Five Day Notice of Rent Past Due and Possible Termination of Tenancy.” The notice stated that if payment of past-due rent and late fees was not made within five days of delivery of the notice, an

¹Colleen Eicher executed the lease on behalf of the Eichers and Sandoval’s sister-in-law, Dina Ulloa, signed the lease on behalf of Sandoval and acted as the property manager.

eviction action would be filed. According to the notice, the Eichers owed rent totaling \$13,600, plus late fees of \$400 for December 2009 through November 2010.²

¶4 On December 1, 2010, Sandoval filed a complaint for forcible detainer, alleging the Eichers were “wrongfully withhold[ing] possession of the [property]” and owed a total of \$14,000 in past-due rent and late fees. In their answer and counterclaim, the Eichers asserted that they “never refused to pay the agreed upon rent” and alleged that Sandoval had refused to accept the rent they offered “to improperly try to evict [them].” The Eichers’ counterclaim included claims for breach of the lease and violations of the Arizona Residential Landlord and Tenant Act (ARLTA). *See* A.R.S. §§ 33-1301 through 33-1381.

¶5 A six-day jury trial was held in March 2011. The jury found the Eichers not guilty of special detainer,³ determined Sandoval was not entitled to possession of the property, and awarded Sandoval damages in the amount of \$14,730—\$14,400 for nine months of rent and \$330 for eleven months of unpaid water utility bills. The jury returned verdicts in favor of the Eichers on their counterclaims, finding that Sandoval had

²Past-due rent was calculated at \$1,600 per month for January 2010 through November 2010 and \$800 for December 2009.

³The verdict form referred to Sandoval’s claim as a “special forcible detainer.” In their brief, the Eichers refer to this action as a “forcible detainer,” but they cite both the forcible detainer statute, A.R.S. § 12-1178(B), and the special detainer statute, § 33-1377(G), in their analysis. Although Sandoval’s complaint is sufficiently broad to meet the provisions of either statute, *see Thompson v. Harris*, 9 Ariz. App. 341, 344, 452 P.2d 122, 125 (1969), we agree with the trial court that this is a special detainer action because Sandoval sought possession based on the Eichers’ alleged breach of an ongoing lease agreement, *see Keenen v. Biles*, 199 Ariz. 266, n.1, 17 P.3d 111, 112 n.1 (App. 2001). Therefore, we focus our discussion on the law pertaining to special detainer actions.

breached the lease agreement and had violated ARLTA. The jury awarded the Eichers damages in the amount of \$5,000—\$3,600 for the breach of the lease and \$1,400 for the ARLTA violation. The trial court excused the jury and directed the Eichers' counsel to prepare a form of judgment.

¶6 On April 14, 2011, instead of lodging a form of judgment with the trial court, the Eichers filed a motion to vacate the jury award in favor of Sandoval, claiming that the award violated state and federal law.⁴ At a hearing on April 29, 2011, the court denied the Eichers' motion, finding they had waived the issue pursuant to Rule 49(c), Ariz. R. Civ. P. The court then entered final judgment, which included an award of damages to Sandoval in the amount of \$9,730. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1).

Discussion

¶7 The Eichers maintain the trial court's award of damages to Sandoval violates Arizona law, specifically § 33-1377(G), because the jury found the Eichers not guilty of special detainer. Moreover, the Eichers claim the award violates principles of due process and equal protection under both the state and federal constitutions.⁵

⁴The Eichers' motion also requested an additur of damages, contending the award on their counterclaims was insufficient given the evidence presented at trial. The trial court denied that request, and it is not at issue here.

⁵Sandoval has not filed an answering brief. In our discretion, when an appellant has raised a debatable issue, we may treat the appellee's failure to file an answering brief as a confession of reversible error. *McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, ¶ 13, 165 P.3d 667, 670 (App. 2007). Although we believe this case presents a debatable issue, we nevertheless address the merits to clarify an area of law. *See Ghyselink v. Buchanan*, 13 Ariz. App. 125, 126, 474 P.2d 844, 845 (1970)

¶8 A landlord may file a special detainer action “to terminate a tenant’s lease for breach of a current, valid lease agreement,” *Keenen v. Biles*, 199 Ariz. 266, n.1, 17 P.3d 111, 112 n.1 (App. 2001), including where a tenant fails to pay rent, §§ 33-1377(A), 33-1368(B). Special detainer actions are summary proceedings, governed by the Rules of Procedure for Eviction Actions (RPEA). Ariz. R. P. Evic. Actions 1, 2. The primary issue before the trial court in a special detainer is “the right to actual possession.” § 33-1377(D). However, a tenant may allege counterclaims when the landlord is not in compliance with the rental agreement or the ARLTA. § 33-1365(A); *see also Mead, Samuel & Co. v. Dyar*, 127 Ariz. 565, 569, 622 P.2d 512, 516 (App. 1980). Moreover, the procedures and appeal rights described in the forcible detainer statute generally apply to special detainer actions. § 33-1377(A).

¶9 Section 33-1377(D) provides that the trial court may award “damages, attorney fees and costs as prescribed by law.” “If the defendant is found guilty, the court shall give judgment for the plaintiff for restitution of the premises, for late charges stated in the rental agreement, for costs and, at the plaintiff’s option, for all rent found to be due and unpaid through the periodic rental period.” § 33-1377(F). Conversely, “[i]f the defendant is found not guilty, judgment shall be given for the defendant against the plaintiff for costs, and if it appears that the plaintiff has acquired possession of the premises since commencement of the action, a writ of restitution shall issue in favor of the defendant.” § 33-1377(G).

(confession-of-error rule permissive rather than mandatory); Ariz. R. Civ. App. P. 15(c) (appeal may be submitted for decision when appellee does not file brief).

¶10 In this case, the jury found the Eichers not guilty of special detainer but also awarded Sandoval damages in the amount of \$14,730. The Eichers filed a motion to vacate the jury award, claiming the award of damages to Sandoval was “illegal” because they “were unanimously found not guilty of [special] detainer . . . and the only judgment that could be entered . . . under the mandatory language of [§ 33-1377(G)] was in their favor.” Additionally, the Eichers argued that entry of an award in favor of Sandoval would violate the principles of due process and equal protection.

¶11 The trial court denied the Eichers’ motion to vacate, finding the issue waived pursuant to Rule 49(c), Ariz. R. Civ. P., and *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz. 535, 48 P.3d 485 (App. 2002). The court further noted that, even if the issue had not been waived, “the jury award is not irreconcilable under the facts of this case.” The court reasoned that the jury could have believed the Eichers offered the rent and Sandoval refused to accept it—a finding consistent with the jury’s verdict that the Eichers were not guilty of special detainer. However, the jury also could have found that even though Sandoval refused the rent payments, he nevertheless was entitled to them. The court thus concluded that the verdict was permissible under the statutes and that entering a judgment in favor of Sandoval did not violate the Eichers’ rights to due process and equal protection.

¶12 We first address the court’s determination—based on this court’s reasoning in *Trustmark*, which relies on Rule 49(c)—that the Eichers waived the right to challenge

the jury verdict.⁶ We review the application of court rules de novo. *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, ¶ 22, 189 P.3d 1114, 1122 (App. 2008).

¶13 In *Trustmark*, we held that where a party believes a jury verdict is inconsistent, defective, or nonresponsive, that party must move for resubmission of the case to the jury pursuant to Rule 49(c) before the jury is excused. 202 Ariz. 535, ¶ 39, 48 P.3d at 493. In that case, the jury found in favor of Trustmark on its negligence claim, but fixed damages at zero and apportioned fault at fifty percent for each party. *Id.* ¶ 38. We concluded that because actual damages are an essential element of negligence, the verdict clearly was inconsistent. *Id.* We pointed out, however, that under Rule 49(c), “the court is required to call the jury’s attention to [any] inconsistency in the verdict and send the jury [back] to further deliberate.” *Id.* ¶ 39. And because Trustmark did not invoke Rule 49(c) before the jury was dismissed, it waived its objection to any error. *Id.*

¶14 However, unlike *Trustmark*, which was a civil case, this is a special detainer action, and the Rules of Civil Procedure are inapplicable to special detainers, except as expressly provided in the RPEA. Rule 1, Ariz. R. P. Evic. Actions, states, “[t]he Arizona Rules of Civil Procedure apply only when incorporated by reference in these rules, except that Rule 80(i) shall apply in all courts and Rule 42(f) shall apply in

⁶The Eichers did not meaningfully address the issue of waiver in their opening brief. *See* Ariz. R. Civ. App. P. 13(a)(6). Their failure to do so “can constitute abandonment and waiver of that claim,” *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009); however, in our discretion, we address this issue because it was the basis of the trial court’s decision.

the superior courts.”⁷ Rule 12, Ariz. R. P. Evid. Actions, addresses jury trials; Rule 13, Ariz. R. P. Evid. Actions, discusses verdicts and the entry of judgment; and Rule 15, Ariz. R. P. Evid. Actions, provides for relief from judgments. Rule 49(c), Ariz. R. Civ. P., is not referred to in Rule 12, 13, 15, or elsewhere in the RPEA. We thus conclude that Rule 49(c) and *Trustmark* are inapplicable to special detainer actions. Accordingly, the trial court erred in finding that the Eichers waived their challenge to the jury verdict by failing to invoke Rule 49(c) before the jury was excused.⁸

¶15 We now turn to the merits of Eichers’ argument that the jury verdict is contrary to law. As they did below, the Eichers rely on § 33-1377(F) and (G) to support their contention that “once a tenant is found not guilty [of special detainer], the owner or landlord of the property is not entitled to an award of damages whatsoever, while the tenant is solely entitled to a damage award.” The interpretation of a statute is a question of law we review de novo. *Lear v. Fields*, 226 Ariz. 226, ¶ 15, 245 P.3d 911, 917 (App. 2011).

¶16 Our primary goal in interpreting a statute is to determine and give effect to the legislature’s intent. *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 7, 122 P.3d 6, 10 (App. 2005). We look first to the language of the statute as the best indicator of that

⁷Rule 80(i), addressing unsworn declarations, and Rule 42(f), concerning changes of judge, are not relevant to this case.

⁸Notably, the trial court did not base its ruling on common law waiver principles but, instead, relied upon Rule 49(c)’s specific language setting forth the time frame for challenging a jury verdict. Because the court relied upon a specific rule that is not applicable to special detainer actions, we decline to nevertheless apply general common law waiver principles.

intent. *Mathews ex rel. Mathews v. Life Care Ctrs. of America, Inc.*, 217 Ariz. 606, ¶ 6, 177 P.3d 867, 869 (App. 2008). If the statute’s language is clear and unambiguous, our duty is simply to apply the plain language. *Id.* Moreover, when interpreting a statute, we use a common-sense approach and strive to harmonize all related provisions. *Morgan v. Carillon Invs., Inc.*, 207 Ariz. 547, ¶ 7, 88 P.3d 1159, 1161 (App. 2004).

¶17 We agree with the Eichers that the language of § 33-1377(F) and (G) evinces a clear legislative intent to limit the awards available depending on the determination of guilt. Section 33-1377(F) provides that the trial court shall enter judgment for the landlord for costs, late charges as stated in the lease, and, at the landlord’s choice, all past-due rent and must issue a writ of restitution for the plaintiff, “[i]f the defendant is found guilty.” In contrast, when a tenant is found not guilty of special detainer, the court must enter judgment for the tenant for costs, and, if appropriate, a writ of restitution for the tenant. § 33-1377(G). Quite simply, the legislature did not provide an avenue under the special detainer statutes for a landlord to recover past-due rent in the same action in which the tenant is found not guilty of special detainer.⁹ Had the legislature so intended, it could have said so. *Cf. Roller Village, Inc. v. Superior Court*, 154 Ariz. 195, 199, 741 P.2d 328, 332 (App. 1987) (“The expression of one or more items of a class in a statute indicates an intent to exclude items of the same class which are not expressed.”).

⁹Nothing in this decision should be interpreted to mean that Sandoval is not entitled to recover rent that is owed despite the jury finding the Eichers not guilty of special detainer. In such instances, a landlord may bring a separate civil action to enforce that remedy. *See* A.R.S. § 12-1183 (proceedings under forcible detainer statute “shall not bar an action for trespass, damages, waste, rent or mesne profits”).

¶18 Our interpretation of § 33-1377(F) and (G) is further supported by related provisions in the special detainer statutes and the RPEA. Section 33-1377(A) states that the remedies available in a special detainer are listed in § 33-1368. And § 33-1368(C) provides: “The landlord may recover all reasonable damages, resulting from noncompliance by the tenant with the rental agreement.” In other words, the landlord’s recovery of damages is contingent upon the tenant’s breach of the lease. And where, as here, the trier of fact has found the tenant not guilty of special detainer, it necessarily has concluded that the tenant did not breach the lease as the landlord alleged.

¶19 Similarly, according to Rule 13(c)(2), Ariz. R. P. Evid. Actions, “[i]n addition to determining . . . possession, and if either party seeks a money judgment, the court may award damages to the party entitled to possession.” The rule continues, “[i]f appropriate, rent shall be awarded to a prevailing plaintiff.” Ariz. R. P. Evid. Actions 13(c)(2)(A). And “[i]f the landlord charged utilities to the tenant under a written or oral agreement, unpaid amounts may be awarded to the prevailing plaintiff.” Ariz. R. P. Evid. Actions 13(c)(2)(B). Thus, Rule 13 also makes clear that a landlord’s ability to recover damages is dependent on the tenant’s guilt in a special detainer action.

¶20 We do not fault the trial court for reasoning that the jury verdict is not irreconcilable with pertinent statutes under the facts of the case. We agree with the court that the jury verdict—awarding the Eichers possession of the property and Sandoval damages for rent that is owed—appears to be an equitable resolution of this case. However, we disagree that the jury’s damages award to Sandoval can be reconciled with the clear and unambiguous language of § 33-1377(F) and (G). Because the jury found

the Eichers not guilty of special detainer and yet awarded Sandoval \$14,730 in damages, the award violates the statutory scheme and must be vacated.

¶21 Finally, because we resolve the Eichers’ appeal based on the language of § 33-1377(F) and (G), we need not reach their due process and equal protection arguments. *See Petolicchio v. Santa Cruz Cnty. Fair & Rodeo Ass’n*, 177 Ariz. 256, 259, 866 P.2d 1342, 1345 (1994) (“Arizona’s courts do not reach constitutional issues if proper construction of a statute makes it unnecessary in determining the merits of the action.”); *see also Fragoso v. Fell*, 210 Ariz. 427, ¶ 6, 111 P.3d 1027, 1030 (App. 2005) (courts should avoid deciding cases based on constitutional issues if possible).

Disposition

¶22 For the reasons stated above, the judgment based upon the jury’s damages award in favor of Sandoval is vacated, and this case is remanded for further proceedings consistent with this decision.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge